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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
EASTERN DIVISION

ISABEL MERCADO,	)	Case No. EDCV 07-00042-MLG
	)	
Plaintiff,	)	MEMORANDUM OPINION AND ORDER
	)	
v.	)	
	)	
MICHAEL J. ASTRUE,	)	
Commissioner of the	)	
Social Security	)	
Administration,	)	
	)	
Defendant.	)	
_____	)	

**I. Factual and Procedural Background**

This is an action for judicial review of the Social Security Commissioner's final decision denying Plaintiff's application for disabled widow's benefits under 42 U.S.C. §§ 402(e), 423. Plaintiff Isabel Mercado is the widow of a wage earner who died fully insured on February 2, 1988. (Administrative Record ("AR") 12). Her prescribed seven-year eligibility period ended January 31, 2006. (AR 12, 21). Plaintiff filed her application for Social Security Widow's Insurance Benefits on July 30, 2003, alleging that she is disabled due to hypertension, a seizure disorder, and a left foot infection. (AR 12, 44).

1 Plaintiff was born on July 8, 1953, and is currently 54 years old.  
2 (AR at 11). She has a sixth grade education, is illiterate, and is  
3 unable to communicate effectively in English. (AR 11). She claims that  
4 her conditions first prevented her from working on May 12, 2002. (AR  
5 55). Since that date, her only work has been babysitting for her  
6 granddaughter for \$400 per month. (AR 55-56).

7 The Social Security Administration denied Plaintiff's application  
8 for widow's benefits initially and upon reconsideration. (AR 21, 27).  
9 Plaintiff filed a timely request for a hearing, which was held before  
10 Administrative Law Judge Larry B. Parker ("the ALJ") on June 13, 2005.  
11 (AR 34, 35). The ALJ was required to decide whether Plaintiff became  
12 disabled by way of a physical or mental impairment that (1) prevented  
13 her from doing any substantial, gainful work and that (2) lasted twelve  
14 straight months or could be expected to last for that time or result in  
15 death. (AR 37). William M. Kuntz acted as Plaintiff's counsel at the  
16 hearing. (AR 185).

17 On October 28, 2005, the ALJ issued a decision denying Plaintiff  
18 benefits. (AR 18). The ALJ determined that Plaintiff's impairments are  
19 severe and that she has no past relevant work experience, but that her  
20 residual functional capacity ("RFC") and vocational profile enable her  
21 to perform jobs which exist in significant numbers in the national  
22 economy. (AR 12). The ALJ found that Plaintiff retains the RFC to  
23 perform a range of work activities at the medium exertional level.  
24 (*Id.*).

25 The ALJ reviewed Plaintiff's medical history, which included  
26 reference to severe tinea pedis (ringworm) in her left foot (now  
27 apparently healed), hypertension, seizure-like episodes, headaches,  
28 stroke, hypothyroidism, mild depression, and anxiety. (AR 13-16). The

1 ALJ rejected Plaintiff's allegations as to the nature, severity and  
2 functionally limiting effects of her impairments and symptoms. (AR 16).  
3 Among the reasons the ALJ provided in support of his rejection of  
4 Plaintiff's claims were: (1) Plaintiff's impairments are under control  
5 through conservative treatments, (2) physical examinations of Plaintiff  
6 were generally unremarkable, (3) there is no evidence that Plaintiff  
7 suffers from severe psychological problems, (4) the consultative  
8 examiner found no evidence supporting the imposition of exertional  
9 restrictions or of severe mental impairments, (5) Plaintiff seems to  
10 have recovered from her stroke without functional restrictions, and (6)  
11 the evidence does not support a diagnosis of a seizure disorder, and  
12 Plaintiff's seizure-like spells do not prevent Plaintiff from extensive  
13 activities of daily living. (AR 16-17).

14 The ALJ decided that Plaintiff is not disabled, applying the  
15 framework of Medical-Vocational Guideline Rule 203.18.<sup>1</sup> (AR 17). On the  
16 basis of vocational expert testimony, he determined that Plaintiff is  
17 capable of working as a production helper (247 local and 34,000 national  
18 jobs) or a production assistant (356 local and 236,000 national jobs).  
19 (Id.). On this basis, the ALJ determined that Plaintiff is not under a  
20 disability as defined by the Social Security Act. (Id.).

21 Plaintiff filed a timely request for review of the ALJ's decision.  
22 The Appeals Council denied review on November 28, 2006. (AR 3).

23 On January 9, 2007, Plaintiff commenced this action for judicial  
24 review, contending that the ALJ: (1) failed to properly consider all of  
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26 <sup>1</sup> Consistent with the ALJ's finding that Plaintiff has severe  
27 impairments but can perform a range of medium work activities, Rule  
28 203.18 falls within the table of the Medical-Vocational Guidelines  
dedicated to an RFC of "medium work as a result of a severe medically  
determinable impairment." 20 C.F.R., Part 404, Subpart P, Appdx. 2.

1 the available medical evidence in the record; (2) failed to adequately  
2 consider Plaintiff's subjective complaints and improperly assessed  
3 Plaintiff's credibility; and (3) erred in relying on defective  
4 vocational expert testimony. The Commissioner disagrees.

## 5 6 **II. Standard of Review**

7 Under 42 U.S.C. § 405(g), a district court may review the  
8 Commissioner's decision to deny benefits. The Commissioner's or ALJ's  
9 decision must be upheld unless "the ALJ's findings are based on legal  
10 error or are not supported by substantial evidence in the record as a  
11 whole." *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1990); *Parra v.*  
12 *Astrue*, 481 F.3d 742, 746 (9th Cir. 2007). Substantial evidence means  
13 such evidence as a reasonable person might accept as adequate to support  
14 a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Widmark*  
15 *v. Barnhart*, 454 F.3d 1063, 1066 (9th Cir. 2006). It is more than a  
16 scintilla, but less than a preponderance. *Robbins v. Soc. Sec. Admin.*,  
17 466 F.3d 880, 882 (9th Cir. 2006). To determine whether substantial  
18 evidence supports a finding, the reviewing court "must review the  
19 administrative record as a whole, weighing both the evidence that  
20 supports and the evidence that detracts from the Commissioner's  
21 conclusion." *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1996). "If  
22 the evidence can support either affirming or reversing the ALJ's  
23 conclusion," the reviewing court "may not substitute its judgment for  
24 that of the ALJ." *Robbins*, 466 F.3d at 882.

## 25 26 **III. Discussion and Analysis**

### 27 **A. Consideration of all the Medical Evidence**

28 Plaintiff contends that the ALJ erred by failing to properly

1 consider all of the available medical evidence in the record. (Joint  
2 Stipulation ("JS") at 3). Plaintiff specifically argues that the ALJ  
3 failed to properly consider: (1) Plaintiff's fatigue, depression,  
4 anxiety, left-foot problems, headaches, severe hypertension, and  
5 multiple subcortical white matter lesions, which the Court understands  
6 as a complaint that the ALJ failed to adequately develop the record; and  
7 (2) a medical opinion prepared by Dr. George Ricks, one of Plaintiff's  
8 treating physicians. (Joint Stipulation ("JS") at 3-4). Each contention  
9 is treated in turn.

10 **1. Failure to Develop the Record as to Plaintiff's Impairments**

11 An ALJ's duty to develop the record arises only when the evidence  
12 is ambiguous or the record inadequate for proper evaluation. *Mayes v.*  
13 *Massanari*, 276 F.3d 453, 459-60 (9th Cir. 2001). The requirement that  
14 an ALJ obtain additional information (contacting a treating physician,  
15 ordering a consultative examination, etc.) is "triggered only when the  
16 evidence from the treating medical source is inadequate" to make a  
17 determination or decision as to whether the claimant is disabled.  
18 *Thomas v. Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002). In social  
19 security cases, the ALJ has a special duty to develop the record fully  
20 and fairly and to ensure that a claimant's interests are considered,  
21 even when that claimant is represented by counsel. *Massanari*, 276 F.3d  
22 at 459.

23 Plaintiff claims that the ALJ should have developed the record on  
24 the soft tissue swelling in her left foot, as indicated in an x-ray of  
25 January 7, 2003. (JS at 3, AR at 140). The ALJ noted that Plaintiff's  
26 left foot exhibited swelling and tinea pedis at the January 7, 2003  
27 examination. (AR at 12). He also noted that Plaintiff was treated for  
28 the tinea pedis on September 5, 2003. Plaintiff was apparently treated

1 successfully, as complaints about foot swelling do not appear again in  
2 her medical history. (AR at 16). Plaintiff points to no evidence in the  
3 record indicating that her foot maladies plagued her on an ongoing basis  
4 or even for the twelve months required to qualify for a disability. 42  
5 U.S.C. § 423(d)(1)(A). The ALJ was under no obligation to further  
6 develop an already clear and complete record as to Plaintiff's foot  
7 problems.

8 Plaintiff next asserts that additional information was required  
9 concerning the combination of Plaintiff's hypertension and white matter  
10 lesions found on Plaintiff's brain. (JS at 3-4). The record is replete  
11 with hypertension diagnoses and tests revealing minor subcortical  
12 abnormalities. (AR at 149-150, 153, 163, 169, 176, 180). The ALJ noted  
13 the evidence of hypertension in his findings and in his narrative of  
14 Plaintiff's medical history. (AR at 12-17). He further alluded to  
15 Plaintiff's subcortical abnormalities. (AR at 13). Plaintiff challenges  
16 the ALJ's failure to seek additional evidence relating to the  
17 subcortical abnormalities. However, the only evidence that suggests any  
18 impairment stemming from the subcortical abnormalities - a radiologist's  
19 opinion that migraines and vascular disease could be possible  
20 consequences of the white matter lesions (AR at 150) - are not  
21 demonstrably related to Plaintiff's claimed disabilities, namely seizure  
22 disorder, hypertension and a left foot infection. (AR at 150).  
23 Consequently, there was no relevant ambiguity or lack of complete  
24 development as to Plaintiff's subcortical abnormalities.

25 **2. Failure to Properly Consider the Medical Opinion of Dr. Ricks**

26 It is the responsibility of the ALJ to resolve conflicts and  
27 ambiguities in the medical record and determine credibility. *Meanel v.*  
28 *Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999); *Andrews v. Shalala*, 53 F.3d

1 1035, 1039 (9th Cir. 1989). The ALJ determines which medical opinions  
2 should be given the most weight in light of the general rule in this  
3 circuit that, among the three types of physicians – (1) treating  
4 physicians, i.e., those who treat the claimant; (2) examining  
5 physicians, i.e., those who examine but do not treat; and (3) non-  
6 examining physicians, i.e., those who neither examine nor treat – the  
7 most weight should be given to the opinion of a treating source. *Lester*  
8 *v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). An ALJ should accordingly  
9 give deference to a treating physician's opinion as to the nature and  
10 severity of an impairment if it is well supported and not inconsistent  
11 with other substantial evidence. SSR 96-2p, 1996 WL 374188, at \*1  
12 (S.S.A. July 2, 1996). Opinions of a treating physician may be rejected  
13 where there is a conflicting opinion and the ALJ sets forth specific,  
14 legitimate reasons based on substantial evidence. *Orn v. Astrue*, 495  
15 F.3d 625, 632 (9th Cir. 2007); *Andrews v. Shalala*, 53 F.3d 1035, 1041  
16 (9th Cir. 1995) ("Where the opinion of the claimant's treating physician  
17 is contradicted, and the opinion of a nontreating source is based on  
18 independent clinical findings that differ from those of the treating  
19 physician, the opinion of the nontreating source may itself be  
20 substantial evidence; it is then solely the province of the ALJ to  
21 resolve the conflict.").

22 Plaintiff contends that the ALJ failed to properly consider a  
23 medical opinion prepared by Dr. Ricks regarding Plaintiff's mental and  
24 emotional ability to work. The opinion is a standardized form with  
25 check-boxes and short explanatory sections that Plaintiff faxed to the  
26 ALJ on the day of her hearing. The ALJ provided several reasons for  
27 discounting this opinion of Dr. Ricks, including that it: (1) is undated  
28 and unsigned (on account of its final signature page not being delivered

1 to the ALJ),<sup>2</sup> (2) is set forth on a form supplied by Plaintiff's  
2 attorney, (3) is unaccompanied by any clinical or laboratory studies,  
3 (4) is unsupported by any treating records by Dr. Ricks, (5) is  
4 controverted by the opinions of the state agency and the consultative  
5 psychiatrist, and (6) is consistent the ALJ's own findings regarding  
6 Plaintiff's limitations. (AR at 15).

7 The ALJ's decision to discount Dr. Ricks' opinion was supported by  
8 specific, legitimate reasons based on substantial evidence. *Thomas*, 278  
9 F.3d at 957; *Andrews*, 53 F.3d at 1041. For example, the ALJ noted that  
10 Dr. Ricks' opinion was consistent with the ALJ's own findings regarding  
11 Plaintiff's limitations. Dr. Ricks' opinion does not state or imply  
12 that Plaintiff would be completely unable to work. Dr. Ricks' check-box  
13 evaluations of Plaintiff's mental and emotional capability are split  
14 between the categories of "fair" and "good." Further, Dr. Ricks' short  
15 explanatory answers are consistent with the ALJ's findings - that  
16 Plaintiff suffers from hypertension, anxiety and depression - and stop  
17 short of suggesting that Plaintiff can not function in any work  
18 environment. This and the other reasons provided by the ALJ are  
19 sufficiently specific and based on substantial evidence to support the  
20 ALJ's discounting of Dr. Ricks' opinion.

21 **B. Subjective Complaints of Pain and Credibility Determination**

22 Plaintiff contends that the ALJ failed to adequately consider her  
23 subjective complaints of pain and improperly assessed her credibility.  
24 "[O]nce the claimant produces objective medical evidence of an  
25 underlying impairment, an adjudicator may not reject a claimant's  
26 subjective complaints based solely on a lack of objective medical

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28 <sup>2</sup> Plaintiff has since demonstrated that the opinion is in fact  
dated and signed. (JS at 4-5).



evidence to fully corroborate the alleged severity of pain." *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cir. 1991). To the extent that an individual's claims of functional limitations and restrictions due to the alleged pain are reasonably consistent with the objective medical evidence and other evidence in the case, the claimant's allegations will be credited. SSR 96-7p, 1996 WL 374186, at \* 2 (S.S.A. July 2, 1996) (explaining 20 C.F.R. §§ 404.1529(c)(4), 416.929(c)(4)). Unless there is affirmative evidence showing that the claimant is malingering, the ALJ must provide clear and convincing reasons for discrediting a claimant's complaints. *Robbins v. Social Sec. Admin.*, 466 F.3d 880, 883 (9th Cir. 2006).

Social Security Regulation 96-7p identifies the types of evidence that may be used, in addition to the objective medical evidence, to assess a claimant's credibility.<sup>3</sup> For example, an ALJ may discredit a claimant's testimony if she engages in daily activities that are inconsistent with her allegations. *Bunnell*, 947 F.2d at 346. "Another relevant factor may be 'unexplained or inadequately explained, failure

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<sup>3</sup> SSR 96-7p lists seven types of evidence:

1. The individual's daily activities;
2. The location, duration, frequency, and intensity of the individual's pain or other symptoms;
3. Factors that precipitate and aggravate the symptoms;
4. The type, dosage, effectiveness, and side effects of any medication the individual takes or has taken to alleviate pain or other symptoms;
5. Treatment, other than medication, the individual receives or has received for relief of pain or other symptoms;
6. Any measures other than treatment the individual uses or has used to relieve pain or other symptoms (e.g., lying flat on his or her back, standing for 15 to 20 minutes every hour, or sleeping on a board); and
7. Any other factors concerning the individual's functional limitations and restrictions due to pain or other symptoms.

SSR 96-7p, 1996 WL 374186, at \* 3.

1 to seek treatment or follow a prescribed course of treatment.'" *Id.*  
2 (quoting *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989)). The ALJ may  
3 also use "ordinary techniques of credibility evaluation, such as  
4 considering the claimant's reputation for truthfulness and any  
5 inconsistent statements in her testimony." *Tonapetyan v. Halter*, 242  
6 F.3d 1144, 1148 (9th Cir. 2001) (internal quotations omitted). "General  
7 findings are insufficient; rather, the ALJ must identify what testimony  
8 is not credible and what evidence undermines the claimant's complaints."  
9 *Reddick v. Chater*, 157 F.3d 715, 722 (1998) (quoting *Lester v. Chater*,  
10 81 F.3d 821, 834 (9th Cir. 1996)).

11 The ALJ "reject[ed] the claimant's allegations of the nature,  
12 severity, and functionally limiting effects of her impairments and  
13 symptoms." (AR at 16). The ALJ offered ten specific - though  
14 occasionally repetitive - reasons for its credibility determination,  
15 each of which was based on evidence from Plaintiff's medical record. (AR  
16 at 16-17). The ALJ noted that Plaintiff's conditions were largely under  
17 control and that her physical examinations were unremarkable - making  
18 her complaints completely inconsistent with the objective evidence.  
19 Substantial evidence supported the ALJ's determination to discount  
20 Plaintiff's subjective complaints of debilitating pain.

### 21 C. Reliance on Vocational Expert Testimony

22 Plaintiff finally contends that the ALJ relied upon defective  
23 vocational expert testimony on the availability of jobs for someone with  
24 her RFC and vocational profile. (JS at 17). During the hearing, a  
25 vocational expert testified that a person with Plaintiff's profile could  
26 work as a production helper and a production assistant. (AR at 202).  
27 The vocational expert testified that there were 247 production helper  
28 jobs in San Bernadino County with 34,000 nationally and 356 production

1 assistant jobs in San Bernadino County with 236,000 nationally. (*Id.*).  
2 That totals 603 local positions. Plaintiff's mistaken belief that these  
3 figures related to Southern California rather than to San Bernadino  
4 County renders irrelevant her "these numbers simply do not add up"  
5 argument. (JS at 17).<sup>4</sup> But her argument that the regional numbers of  
6 jobs are insignificant and that the ALJ erred in relying on them must be  
7 fully considered. (JS at 17).

8 A person is not disabled if she can "engage in any other kind of  
9 substantial gainful work which exists in the national economy,  
10 regardless of whether such work exists in the immediate area in which  
11 [she] lives, or whether a specific job vacancy exists for [her], or  
12 whether [she] would be hired if [she] applied for work." 42 U.S.C. §  
13 423(d)(2)(A). Work in the "national economy" means "work which exists  
14 in significant numbers either in the region where such individual lives  
15 or in several regions of the country." *Id.* The Ninth Circuit has never  
16 clearly established the minimum number of jobs necessary to constitute  
17 a "significant number." *Barker v. Secretary of Health and Human*  
18 *Services*, 882 F.2d 1474, 1478 (9th Cir. 1989). Defendant suggests that  
19 the Court consider the number of jobs identified by the vocational  
20 expert in the context of San Bernadino County's relatively lower  
21 population than adj<sup>5</sup>acent areas such as Los Angeles. (JS at 18). But  
22 that manner of ratio analysis was rejected in the very case that  
23 Defendant cites to support his position. *Barker*, 882 F.2d at 1479.

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25 <sup>4</sup> Plaintiff cites to no authority in support of this proposition.

26 <sup>5</sup> A district court in dicta speculated that 363 regional jobs would  
27 "raise serious doubts" as to whether significant numbers of jobs exist.  
28 *Coletta v. Massanari*, 163 F.Supp.2d 1101, 1106 (N.D. Cal. 2001).

1 In any case, the vocational expert's testimony that over 600  
2 appropriate positions exist in San Bernadino county constitutes  
3 substantial evidence to support the ALJ's finding that a significant  
4 number of jobs exist. The Ninth Circuit has consistently found that  
5 more than 1,000 locally or regionally available positions constitute a  
6 significant number of jobs. *See Thomas v. Barnhart*, 278 F.3d 947, 960  
7 (9th Cir. 2002); *Meanel v. Apfel*, 172 F.3d 1111, 1115 (9th Cir. 1999);  
8 *Barker*, 882 F.2d at 1478-79. But it has not set a floor for the finding  
9 of a significant number of jobs. At least one district court within the  
10 Ninth Circuit, as well as the Eleventh Circuit, have found less than 600  
11 jobs to be significant. *Uravitch v. Heckler*, 1986 U.S. Dist. LEXIS  
12 25985 (D. Ariz.) (500-600 mechanic jobs in Maricopa County, 60-75% of  
13 which would require experience beyond that possessed by claimant,  
14 constitute significant number); *Allen v. Bowen*, 816 F.2d 600, 602 (11th  
15 Cir. 1987) (174 small appliance repair jobs in "area" constitute  
16 significant number). Against this backdrop, there was substantial  
17 evidence in support of the finding that there are significant numbers of  
18 jobs in the national economy in which Plaintiff is capable of working.

#### 19 20 **IV. Conclusion**

21 For the reasons stated above, it is **ORDERED** that the decision of  
22 the Commissioner be affirmed and this case dismissed with prejudice.

23 DATED: October 24, 2007

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27 \_\_\_\_\_  
MARC L. GOLDMAN  
United States Magistrate Judge